

MONTANA NATURAL RESOURCES  
EXHIBIT NO. 1  
DATE Jan. 14, 2009  
BILL NO. SB 93

Senate Bill 93  
Closed Basins-Requiring Mitigation for Net Depletion

January 14, 2009

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear and present testimony in support of this legislation. My name is John Tubbs, and I am the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation (Department). My Division is charged with implementing the Montana Water Use Act.

This Bill is a compliment to Senate Bill 94. However, it is drafted as if Senate Bill 94 did not pass. Some minor reconciliation would need to be performed if both bill passed.

**Background:**

- From 1990 until 1999 the Legislature or the Department determined that surface water had been fully appropriated in some 15 river basins and closed them new appropriations with some exceptions.
- These closures included the major basins of the Upper Missouri, Teton, Jefferson & Madison, Upper Clark Fork and Bitterroot River basins.
- In April 2006, the Montana Supreme Court issued a decision in Trout Unlimited v. DNRC that impacts the ability to acquire a new ground water appropriation in all 15 basins under the statute. The Court recognized the interconnectivity of ground water and surface water and that ground water appropriations can capture (deplete) water otherwise discharged to surface water as well as induce infiltration from a surface water source. This decision recognizes that new ground water appropriations can affect surface water flows.
- House Bill 831 (2007) was passed in part to address the decision in Trout Unlimited, which essentially closed many basins to the ground water exceptions in the basin closures.

**Current Status:**

- The provisions of HB 831 (2007) allow for a two-part analysis in determining whether a senior surface water right would be impacted by a groundwater appropriation. §85-2-360, MCA. First, the hydrologic assessment is to provide an analysis of the amount, timing and location of net depletion to surface water caused by the proposed ground water appropriation. Second, an analysis of whether the identified net depletion will cause an adverse effect to surface water rights is required. The statute further provides that the determination of whether or not there is an adverse effect to a prior appropriator is a determination to be made by the Department.
- In the past two years the Department has received 30 new ground water applications under MCA §§85-2-360 through -369 (HB 831-2007). Some have been submitted without mitigation or aquifer recharge plans. In these cases the applicants argue that there is no net depletion, thus no adverse affect to senior surface water users.

- Depletion to surface water is equal to or less than the consumptive use of the ground water appropriation. Not all water used (diverted) in an appropriation is consumed. For example, in most cases, domestic appropriations consume approximately 5% of the water diverted because most of the water is used and returned to the aquifer.

#### **Proposed Amendments:**

- The proposed amendments would require a mitigation or aquifer recharge plan when possible net depletion of surface water is identified in a closed basin. Consumptive use of ground water will result in a net depletion to surface water over time. With extremely rare exceptions, all ground water is ultimately connected to surface water.
- The proposed amendments recognize the Supreme Court decision on the interconnectivity of ground and surface water. Further, they are in-line with the purpose and intent of the legislation that closed basins statutorily and with the administrative rules that closed other basins because these sources are fully appropriated. These closed basins recognize the protections afforded existing water rights in the Montana Constitution (Article IX, section 3) in determining whether water is available for appropriation.
- Without requiring mitigation or aquifer recharge plans to offset possible depletions, the Department foresees short-term and long-term cumulative effects to closed basin surface water resources. While a single appropriation may have minimal effects on a surface water source in a closed basin, continued similar appropriations will cumulatively, significantly impact the resource to the detriment of surface water right holders. For example, the West Gallatin River is administered by the local district court through water commissioners; water right holders generally in the priority of 1890 are out of priority around July of each year. Authorization of ground water appropriations with even minimal effect (a calculable but not a measurable effect) on surface water will still adversely affect those surface water rights.
- The Water Use Act squarely places the burden on new appropriators to demonstrate lack of adverse effect in new appropriations. This Bill is consistent with that burden and requires mitigation not of the full amount proposed for use but only that part which results in depletion.
- The Bill eliminates any question of whether net depletion will cause adverse effect. Eliminating this question will make the process more certain, applicants will know from the outset that they have to offset their net depletion through mitigation or an aquifer recharge plan and may eliminate objections and subsequent legal actions to determine if there is adverse affect.
- Finally the Bill also recognizes that mitigation and aquifer recharge plans may be timed to offset depletion during that period of most impact to senior surface water users.

The Department fully supports this Bill and believes that the statutory changes are necessary to safeguard the water resources in closed basins, consistent the recognition that these resources are already appropriated. Thank you again for opportunity to comment on this legislation.